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November 5, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: Revision of Part 22
CC Docket No. 92-115

Dear Ms. Searcy:

Transmitted herewith on behalf of SMR Systems, Inc. is an original and four (4) copies of its Reply Comments in the above-captioned Docket.

Please contact this law firm if you have any questions with respect to this matter.

Respectfully submitted,

William J. Franklin

William J. Franklin
Attorney for SMR Systems, Inc.

Encls.
WJF/alk
cc: SMR Systems, Inc.
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Revision of Part 22 of
the Commission's rules
governing the Public
Mobile Services

CC Docket No. 92-115

To: The Commission

REPLY COMMENTS OF
SMR SYSTEMS INC.

SMR Systems, Inc. ("SSI"), by its attorneys and pursuant to Section 1.415(c) of the Commission's Rules, hereby files its Reply to certain Comments filed with respect to the Notice of Proposed Rulemaking adopted in the above-captioned proceeding.^{1/}

Proposed Section 22.167; ECPA Concerns. SSI notes with approval that Telocator and other commenters have requested that the Commission take steps resolve the apparent inconsistency which exists between the Commission's proposed Section 22.167 and the Electronic Communications Privacy Act.^{2/}

Proposed Section 22.167 would permit the Commission to grant a finder's preference to applicants who can provide information which permits the Commission to reclaim an unused radio channel. However, ECPA makes it a violation of federal criminal law to intercept the contents of any electronic communication without

^{1/} Revision of Part 22, 7 FCC Rcd 3658 (1992) (Notice of Proposed Rulemaking) ("NPRM"). SSI has filed Comments in this proceeding, generally supporting the NPRM.

^{2/} 18 U.S.C. §§2510-20 ("ECPA").

authorization.^{3/} Monitoring of radio channels, of course, is by far the most efficient -- if not the only -- method of determining whether a given radio channel is being utilized.

The Commission should express its expert opinion that the private monitoring of radio channels to determine activity for the purposes of proposed Section 22.167 (and not to intercept communications) is consistent with the ECPA prohibitions against interception of communications.^{4/} For this purpose, also, the Commission should clarify that the mandatory transmission of a call sign for the purposes of identification does not represent an ECPA-protected communication.^{5/} Such Commission findings

^{3/} 18 U.S.C. §2510(12) defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a ... radio ... system...." subject to certain exceptions not relevant here.

^{4/} 18 U.S.C. §2510(4) defines "intercept" as the "acquisition of the contents of any ... electronic ... communication...." 18 U.S.C. §2510(8) states that the term "contents" includes "with respect to any ... electronic communication, ... any information concerning the substance, purport, or meaning of that communication."

^{5/} Any of several ECPA provisions support this conclusion. Because the common-carrier (and not its subscriber) originates the call sign transmission for identification purposes, the Commission may conclude that the carrier is a party to the transmission of the call sign and that any recipient thereof is also a party to the conversation. If so, then receipt of the call sign is permitted under 18 U.S.C. §2511(2)(d) (party to communications may consent to interception), 18 U.S.C. §2511(g) (lawful to intercept communications readily accessible to the general public, intended for the general public, necessary to identify harmful interference, or monitored by other users of the frequency), and 18 U.S.C. §2511(h)(ii) (lawful for common carrier to intercept communications to protect others from unlawful use of communications services).

could establish the "good faith reliance" defenses contemplated by 18 U.S.C. §2520(d) to allegations of ECPA violations.

Paging on UHF Channels. International Mobile Machines ("IMM") suggests (Comments at 2-6) that the Commission should begin "a suspension of paging licensing" on UHF two-way channels in rural areas. IMM bases this suggestion on the asserted need for additional Basic Exchange Telecommunications Radio Service ("BETRS") service on the common-carrier UHF channels. For several reasons, SSI opposes this suggestion.

The combined use of UHF common-carrier channels for both paging and two-way service in rural areas is clearly both cost-effective and spectrum efficient. As a threshold matter, the Commission must recognize that any paging channel is inherently more spectrum efficient (in terms of messages per hour or subscribers per channel) than any two-way channel. In rural areas where the aggregate number of communications users is lower, combining both paging and two-way communications on a single channel saves the second channel which otherwise would be required.

Further, IMM's implicit assumption that BETRS is somehow superior to paging service (and thus, is to be preferred in the licensing process) has no support in the record.^{5/} The decision

^{5/} IMM similarly did not provide any record support the specification of the common-carrier UHF channels as the expansion vehicle for BETRS service, as contrasted with any of the other channels or competitive services. In this context also, the
(continued...)

whether to offer paging service, traditional IMTS two-way service, or BETRS service over a given two-way channel should be determined by the Commission licensees and their customers based on their perceived needs and communications requirements as a marketplace decision.

Finally, the Commission must recognize that, even if IMM's request were adopted, it would provide no additional spectrum for BETRS usage. IMM does not propose migrating the existing UHF paging users to other frequency bands. Thus, whatever UHF channel congestion exists now would continue to exist for the foreseeable future. In summary, IMM's proposal offers no public benefits but would impose substantial public costs.

Proposed Section 22.142 -- "Service to the Public". SSI noted that substantial conflict exists between various commenters over the definition of "service to the public."

For example, GTE observes (Comments at 8-9) that subscribers can be served until after the Form 489 notification has been mailed to the Commission. Thus, GTE reasons that "service to the public" can only mean that a system has the capability "of providing service as required by FCC rules..." and is fact available to do so.

In contrast, Pacific Bell and Nevada Bell (Comments at 5) assert that "service to the public" must mean that a system has

^{5/}(...continued)
future need for BETRS is likely to diminish as the broad range of Personal Communications Services ("PCS") come to market.

"a specified minimum number of non-affiliated revenue-producing customers." This definition accords with existing Commission practice, which apparently was adopted because the existence of revenue-producing customers can eliminate any difficult factual decisions regarding actual system capabilities.

SSI supports a middle ground between these two positions. On the one hand, providing service to "non-affiliated revenue-producing customers" can be used as a "safe-harbor" to establish that a system is serving the public.

On the other hand, GTE is correct that in certain circumstances a system may be serving the public even though it does not yet have customers. Indeed, the mere existence of a new system in a given area and the additional communications functions which it can offer to the public also serves the public interest. In other words, so long as a system is not constructed as a sham to implement a frequency warehousing scheme, it provides an opportunity benefit to the public.

In these circumstances, the Commission should permit a licensee (whose system does not have paying customers) to demonstrate through objective evidence (equipment lists, utility bills, interconnection documentation, Yellow Pages and other advertising, demonstrated subscriber-service and billing capability, etc.) that its system is fully capable and available to service the public.

CONCLUSION

Accordingly, SMR Systems Inc. respectfully requests that the Commission adopt its proposed revisions to Part 22 with the rule changes suggested herein and in SSI's Comments.

Respectfully submitted,

SMR SYSTEMS INC.

By: William J. Franklin
William J. Franklin
Its Attorney

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